Supreme Court, U.S.
FILED
SEP 23 1992
OFFICE OF THE CLERK

Nos. 92-269 and 92-324

In the Supreme Court of the United States

OCTOBER TERM, 1992

DELMUS G. GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

BILL J. PATRICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners' conspiracy convictions were defective on the ground that one object of the conspiracy was not a crime.

2. Whether petitioner Gross had sufficient notice that structuring deposits in collision with a bank official so as to avoid currency transaction reporting requirements was illegal.

3. Whether petitioner Patrick is entitled to a new trial because one juror, during jury selection, withheld certain information.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Griffin v. *United States*, 112 S. Ct. 466 (1991)	7
McCoy v. *Goldston*, 652 F.2d 654 (6th Cir. 1981)	13
Stromberg v. *California*, 283 U.S. 359 (1931)	7
United States v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985)	9
United States v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985)	9-10
United States v. *Giancola*, 783 F.2d 1549 (11th Cir.), cert. denied, 479 U.S. 1018 (1986)	10
United States v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986)	9
United States v. *Larson*, 796 F.2d 244 (8th Cir. 1986)	9
United States v. *Meros*, 866 F.2d 1304 (11th Cir.), cert. denied, 493 U.S. 932 (1989)	10
United States v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983)	10
United States v. *Varbel*, 780 F.2d 758 (9th Cir. 1986)	9
Wisniewski v. *United States*, 353 U.S. 901 (1957)	13

Statutes and regulations:

Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5311 *et seq.*:	
31 U.S.C. 5313	2, 5, 6, 7, 8, 10, 11
31 U.S.C. 5321	8
31 U.S.C. 5322	2, 5, 6, 7, 10

Statutes and regulations—Continued: Page

31 U.S.C. 5324 11
31 U.S.C. 5324(3) 2, 6, 7, 8, 10
Money Laundering Act of 1986, (Subtitle H of the Anti-Drug Abuse Act of 1986), Pub. L. No. 99-570, 100 Stat. 3207-18 to 3207-39 11
§ 1354, 100 Stat. 3207-22 11
18 U.S.C. 2(b) 9
18 U.S.C. 371 2
18 U.S.C. 1952(a)(3) 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 848 2
26 U.S.C. 7203 2
31 C.F.R.:
Sections 103.21-103.29 8
Section 103.22(a) 5

Miscellaneous:

S. Rep. No. 433, 99th Cong., 2d Sess. (1986) 11-12

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-269

DELMUS G. GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 92-324

BILL J. PATRICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)[1] is reported at 965 F.2d 1390.

[1] "Pet. App." refers to the appendix filed in No. 92-269.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A petition for rehearing was denied on July 7, 1992. Pet. App. 15a. The petition for a writ of certiorari in No. 92-269 was filed on August 11, 1992, and the petition for a writ of certiorari in No. 92-324 was filed on August 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of conspiring to cause a financial institution to fail to file currency transaction reports, in violation of 18 U.S.C. 371 and 31 U.S.C. 5313, 5322, and 5324(3). Petitioner Gross also was convicted on 17 substantive counts of causing a bank to fail to file currency transaction reports, in violation of 31 U.S.C. 5313 and 5322. Petitioner Patrick also was convicted on one count of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848; one count of conspiring to distribute cocaine and marijuana, in violation of 21 U.S.C. 846; three counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1); five counts of interstate travel with intent to promote a cocaine possession and distribution business, in violation of 18 U.S.C. 1952(a)(3); and one count of failing to file an income tax return, in violation of 26 U.S.C. 7203. Gross was sentenced to five years' imprisonment and was fined $150,000, while Patrick was sentenced to 21 years' imprisonment, to be followed by five years' supervised release, and was ordered to forfeit certain property. The court of appeals reversed Patrick's CCE conviction but affirmed the remainder of his convictions. The court affirmed Gross's conspiracy conviction but reversed

all but one of Gross's convictions on the substantive counts. Pet. App. 1a-14a.

1. The evidence at trial showed that petitioner Patrick and co-defendant Joseph Mohwish operated a cocaine and marijuana drug distribution and money laundering business in the Cincinnati, Ohio, area. Patrick obtained the drugs used in the operation and located wholesale and retail customers. Mohwish coordinated the drug operation with Patrick and stored cocaine. Petitioner Gross and Mohwish used Gross's automobile dealership and several corporations owned by Mohwish, including a window manufacturing firm known as Season Sash, to launder the proceeds of the drug business and conceal its profits. Pet. App. 2a.

The money laundering was accomplished in the following manner: Mohwish periodically had Season Sash's controller make "interest" payments to Gross, primarily in cash. Gross in turn would deposit those payments into his own account and then return the funds to Mohwish, Patrick, or one of Mohwish's corporations by means of a check. Pet. App. 2a-3a. In order to avoid currency transaction reporting requirements, Gross instructed his bookkeeper to deposit less than $10,000 in cash at a time. *Id.* at 3a; Gov't C.A. Br. 58. There were 17 occasions between June 1983 and March 1985 on which Gross received large cash payments of between $20,000 and $100,000 from Mohwish's companies, made matching deposits into Gross's bank account, and then shortly afterwards issued a check to Mohwish or one of his companies for a similar amount. Pet. App. 3a; Gov't C.A. Br. 31-34.

In December 1983, Gross asked David Maynard, executive vice president of Union Bank & Trust, to keep $100,000 in cash in the bank's safe over the

holidays. Maynard returned the bag to Gross after Christmas, and Gross said he would keep it. Instead, Gross telephoned Maynard and said that he was sending the cash back, that he wanted it to go to one Eddie Ballard, and that he did not want the transaction to be reported. Maynard then obtained 10 cashier's checks for $9,500 each and one cashier's check in the amount of $5,000, made out as Gross had requested. Maynard did not file any currency transaction reports (CTRs) for that transaction. Pet. App. 3a-4a; Gov't C.A. Br. 35.

2. Following their convictions, petitioners moved for a new trial on the ground that one juror had withheld information during jury selection. A magistrate held an evidentiary hearing and recommended that petitioners' claims be denied. R. 361; 3 C.A. Jt. App. 521-544. After reviewing the hearing testimony, the district court adopted the magistrate's recommendations. R. 365; 1 C.A. Jt. App. 129. The court of appeals held that the district court had not abused its discretion in accepting the juror's explanation of why he did not respond when asked if he knew a prospective witness and when asked about any relatives or close friends he had in law enforcement. Pet. App. 11a. The court of appeals also held that the juror was not required to report a transaction by his brother with petitioner Gross's car dealership, and the court held that the juror did not conceal knowledge that his first cousin was employed at Season Sash, because the juror did not learn of that employment until after the trial. *Id.* at 12a. Finally, the court rejected petitioners' argument that the juror had not responded truthfully when asked if any close relative or friend had ever been a defendant in a criminal case. The court held that the district court properly accepted the juror's explanation that he thought the

question applied only to felonies and did not reach plea bargains. The court of appeals therefore held that the juror did not deliberately conceal information, and that petitioners were not entitled to a new trial based on the juror's responses during voir dire. *Ibid.*

3. Gross also challenged the validity of his convictions for violating the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5313, 5322. Federal regulations require financial institutions to file a currency transaction report for each cash transaction of more than $10,000, 31 C.F.R. 103.22(a), and Section 5322 makes it a criminal offense knowingly to violate the regulation. The court of appeals noted that at the time of petitioner's offenses, the Act applied to financial institutions only. Pet. App. 2a. The court observed that under the version of the statute in effect at that time, if currency transactions were structured so as to prevent a financial institution from becoming aware of its reporting obligation, the financial institution did not violate the reporting requirement of the statute. The court ruled that a customer who structured the transactions in those circumstances could not be held criminally liable. *Id.* at 3a. As a result, the court reversed all but one of Gross's convictions for causing a bank to fail to file currency transaction reports. *Id.* at 4a. The court found, however, that the evidence on one of the substantive CTR counts showed that Gross gave bank vice president Maynard a "temporary" deposit of $100,000 cash, and then directed Maynard to obtain cashier's checks for less than $10,000 each and not to file a currency transaction report on the transaction. On that occasion, the court reasoned, the bank had acted knowingly, and Gross had aided and abetted a knowing violation of the CTR filing requirement.

Accordingly, the court affirmed Gross's conviction for that violation. *Id.* at 3a-4a.

The court of appeals also affirmed petitioners' convictions for conspiring to violate the currency transaction reporting requirements. The court found that there was abundant evidence of an agreement between Gross, Patrick, and Mohwish, and that the money laundering operation was an essential feature of the drug business. Pet. App. 4a.

ARGUMENT

1. Petitioners contend (92-269 Pet. 4-5; 92-324 Pet. 15-16) that they were wrongly convicted on the conspiracy count because that count charged them with conspiring to do something that was not a crime at the relevant time.

The conspiracy count charged respondents with conspiring to cause the bank to fail to file CTRs and to file false CTRs, in violation of 31 U.S.C. 5313 and 5322. It also charged them with conspiring to structure transactions with the bank, in violation of 31 U.S.C. 5324(3). As Gross points out, Section 5324(3) did not become effective until October 27, 1986. Petitioners argue that, because none of the substantive CTR offenses for which they were convicted took place after the effective date of Section 5324(3), the jury might have found them guilty of conspiracy based on their agreement to violate Section 5324(3) before the effective date of that statute and thus before such an agreement would have constituted a crime.

Petitioners' argument is flawed for two reasons. First, petitioners attack the factual sufficiency of the evidence as to one of the objects of the conspiracy, not the legal basis for the jury's conviction. The district court instructed the jury that Section 5324(3) was not

effective until October 27, 1986. See 19 Tr. 28. That was precisely the instruction that the defendants requested. See 9 C.A. Jt. App. 1802 ("we believe that date should be included in there because if the jury were allowed to consider all of the dates about which proof has been taken, it would constitute an ex post facto law"). They therefore cannot now complain that the instruction was inadequate or that the jury convicted them based on misinformation concerning the governing legal principles. Petitioners' argument thus reduces to the claim that the jury may have based its conviction on an object of the conspiracy for which there was insufficient evidence—that they conspired to structure transactions with the bank, in violation of 31 U.S.C. 5324(3)—rather than on an object of the conspiracy for which there was ample evidence—that they conspired to cause the bank to fail to file CTRs and to file false CTRs, in violation of 31 U.S.C. 5313 and 5322. As this Court made clear in *Griffin* v. *United States*, 112 S. Ct. 466 (1991), it is presumed under those circumstances that the jury convicted on the basis of the ground that was supported by evidence rather than on the ground for which there was insufficient evidence. 112 S. Ct. at 474.[2] Petitioners' conspiracy convictions therefore were properly upheld even if the evidence was

[2] Petitioners incorrectly rely (92-269 Pet. 5) on decisions in which the Court has set aside general verdicts when one of the possible bases of conviction was legally flawed. See, *e.g.*, *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931). As *Griffin* made clear, a conviction may be reversed because the jury was incorrectly instructed on the legal principles governing one of several possible bases of conviction, but it may not be reversed simply because of a failure of proof on one of several alternative bases. See 112 S. Ct. at 470-474.

insufficient to prove an agreement to violate Section 5324(3) at a time when that statute was in effect.

In any event, there was sufficient evidence to convict petitioners of conspiring to violation Section 5324(3). The conspiracy count charged that the conspiracy continued through 1987, which was after the effective date of Section 5324(3). Several overt acts charged in the conspiracy count also involved cash transactions that took place after the effective date of the statute. See 1 C.A. Jt. App. 67, 79. There was accordingly sufficient evidence for the jury to convict petitioners of having conspired to violate Section 5324(3) after that statute became effective.

2. Petitioner Gross argues (92-269 Pet. 6-10) that his conviction for aiding and abetting a violation of the currency transaction reporting requirements violated his right to due process because he did not have fair warning of the criminal nature of his conduct. Petitioner asserts that there is a conflict in the circuits concerning whether, prior to the enactment of Section 5324(3), an individual could be convicted of aiding and abetting a violation of 31 U.S.C. 5313 and 5321 for causing a bank to fail to file a CTR.

Under 31 U.S.C. 5313, the Secretary of the Treasury has the authority to promulgate regulations requiring a participant in a cash transaction with a domestic financial institution to file a report of the transaction. Pursuant to that authority, the Secretary has promulgated regulations requiring financial institutions to file currency transaction reports (CTRs) whenever a customer engages in a cash transaction of more than $10,000. See 31 C.F.R. 103.21-103.29. The regulations do not, however, di-

rectly impose on the customer an obligation to file a CTR.[3]

A number of courts have held that, in light of the failure of the regulations to impose any duty directly on the customer, 18 U.S.C. 2(b) does not impose accessory liability on a customer who structures a transaction to keep the financial institution from learning that the transaction involves more than $10,000 and thereby prevents the bank from knowingly violating the CTR statute. In the view of those courts, to impose accessory liability on the customer in a case in which the bank did not itself knowingly violate the CTR statute as a principal would fail to give the customer fair notice of the criminality of his conduct. See, *e.g.*, *United States* v. *Anzalone*, 766 F.2d 676, 681-682 (1st Cir. 1985); *United States* v. *Larson*, 796 F.2d 244, 247 (8th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758, 762 (9th Cir. 1986). Other courts, however, have held that an individual who structures a cash transaction to keep a financial institution from learning that the CTR requirements are triggered has caused the institution to fail to file the CTR, and thus is liable under the ordinary interpretation of 18 U.S.C. 2(b). See, *e.g.*, *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th

[3] Gross complains in passing (92-269 Pet. 10) that the district court refused to instruct the jury that he did not have an obligation to file a CTR. As the court of appeals explained, Pet. App. 4a-5a, the district court informed the jury of the relevant statutory provisions imposing the reporting obligation on the bank, and the instructions made clear that petitioners could be convicted for the CTR violations only if they caused or conspired to cause the bank to fail to file a CTR. That was sufficient to apprise the jury of the respective obligations imposed on the bank and parties dealing with the bank.

Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Meros*, 866 F.2d 1304 (11th Cir.), 493 U.S. 932 (1989); *United States* v. *Giancola*, 783 F.2d 1549 (11th Cir.), cert. denied, 479 U.S. 1018 (1986); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983).

In a portion of its decision not at issue on these petitions, the court of appeals reversed all but one of Gross's convictions for substantive CTR violations. In reversing those convictions, the court of appeals essentially agreed with petitioner and with the line of authority represented by *Anzalone*, *Larson*, and *Varbel* that, prior to the enactment of Section 5324(3), it was not a crime for an individual to structure cash deposits to keep the bank from learning that the CTR reporting requirement was triggered.

The court of appeals' affirmance of Gross's conviction on the single remaining CTR count, however, is consistent with both lines of appellate authority. That count arose out of the transaction that took place after Christmas in 1983 in which Gross returned $100,000 in cash to Union Bank & Trust Vice-President Maynard and specifically directed Maynard not to file a CTR. With respect to that transaction, it was clear that the bank had an obligation to file a CTR and failed to do so, since its officer was aware of the fact that the transaction involved more than $10,000 in cash and yet complied with Gross's scheme. Accordingly, the bank was liable for its violation of 31 U.S.C. 5313 and 5322 as principal. Gross's liability as aider and abetter follows under any reasonable interpretation of the statutes involved. His conviction on that count is not called into question by *Anzalone*, *Larson*, or *Varbel*, and there is no conflict among the circuits concerning the validity of that conviction.

In any event, the conflict in authority on which petitioner attempts to rely is of no continuing

importance. As petitioner himself notes, since the time he committed his offense, Congress has amended the currency transaction reporting statute to render structured transactions illegal, regardless of whether the financial institution itself knowingly violated the statute. See Money Laundering Control Act of 1986, Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18 to 3207-39. One of the express purposes of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the position of the Eleventh Circuit in *Tobon-Builes*. Section 1354 of the Act, 100 Stat. 3207-22, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," created a new Section 5324 of Title 31, which provides in pertinent part:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a); (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR as well as for structuring deposits, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. The legislative history specifically states that Congress intended to codify the Eleventh Circuit's pre-1986 position, under which petitioner is clearly liable. S. Rep. No. 433, 99th

Cong., 2d Sess. 21-22 (1986). Thus, even if this case implicated the conflict in the circuits concerning the pre-1986 currency reporting statute, further review to resolve that conflict would not be warranted.

3. Finally, petitioner Patrick argues (92-324 Pet. 18-22) that a juror's failure to respond accurately to several questions during jury selection requires that Patrick be granted a new trial. The courts below correctly resolved that claim against petitioner, and further review of that factbound claim is accordingly unwarranted.

The courts below held that the juror had not deliberately concealed information when he failed to state that he knew potential witness James Dennis (the juror said he knew Dennis by a slightly different name); and when, in response to a question concerning relatives or close friends involved in law enforcement, he failed to disclose that he had been a friend of a now-deceased former sheriff (the juror explained that he understood the question to refer only to relatives or friends currently living) and that his brother was a deputy jailer (the juror stated that he did not understand that a jailer was involved in law enforcement). The courts also found that the juror had not concealed information about familiarity with petitioner Gross (the juror's brother had bought a truck from Gross's car dealership), or Season Sash, because he had none. Finally, the court of appeals held that the district court acted within its discretion in accepting the juror's explanation of why he had not revealed that his brother had pleaded guilty to a misdemeanor. Pet. App. 11a-12a.

Patrick recognizes (92-324 Pet. 20) that a new trial is warranted in the case of undisclosed information during voir dire only if the juror deliberately concealed information or if the undisclosed information

would have resulted in the juror's disqualification for cause. In this case, the district court found that the juror did not deliberately withhold any information and that the information he provided in the post-trial hearing did not show actual bias. The court of appeals upheld both findings. Because Patrick offers nothing to undercut the concurrent findings of the two courts below, his claim must fail.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

SEPTEMBER 1992

[4] Patrick argues (92-324 Pet. 19-22) that the Sixth Circuit's decision in this case conflicts with its previous decision in *McCoy* v. *Goldston*, 652 F.2d 654, 659 (6th Cir. 1981). Review by this Court is not warranted to resolve an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event the decision in this case is not in conflict with the decision in *McCoy*; in *McCoy*, the district court failed to hold a hearing on allegations that established a *prima facie* case of intentional nondisclosure by a juror. Here, by contrast, a hearing was held and the district court found no intentional nondisclosure or bias on the part of the juror.